

No. 12305

United States
Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

EDWARD M. MILLS,

Respondent.

Transcript of Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

NOV 5 1949

PAUL P. O'BRIEN,
CLERK

No. 12305

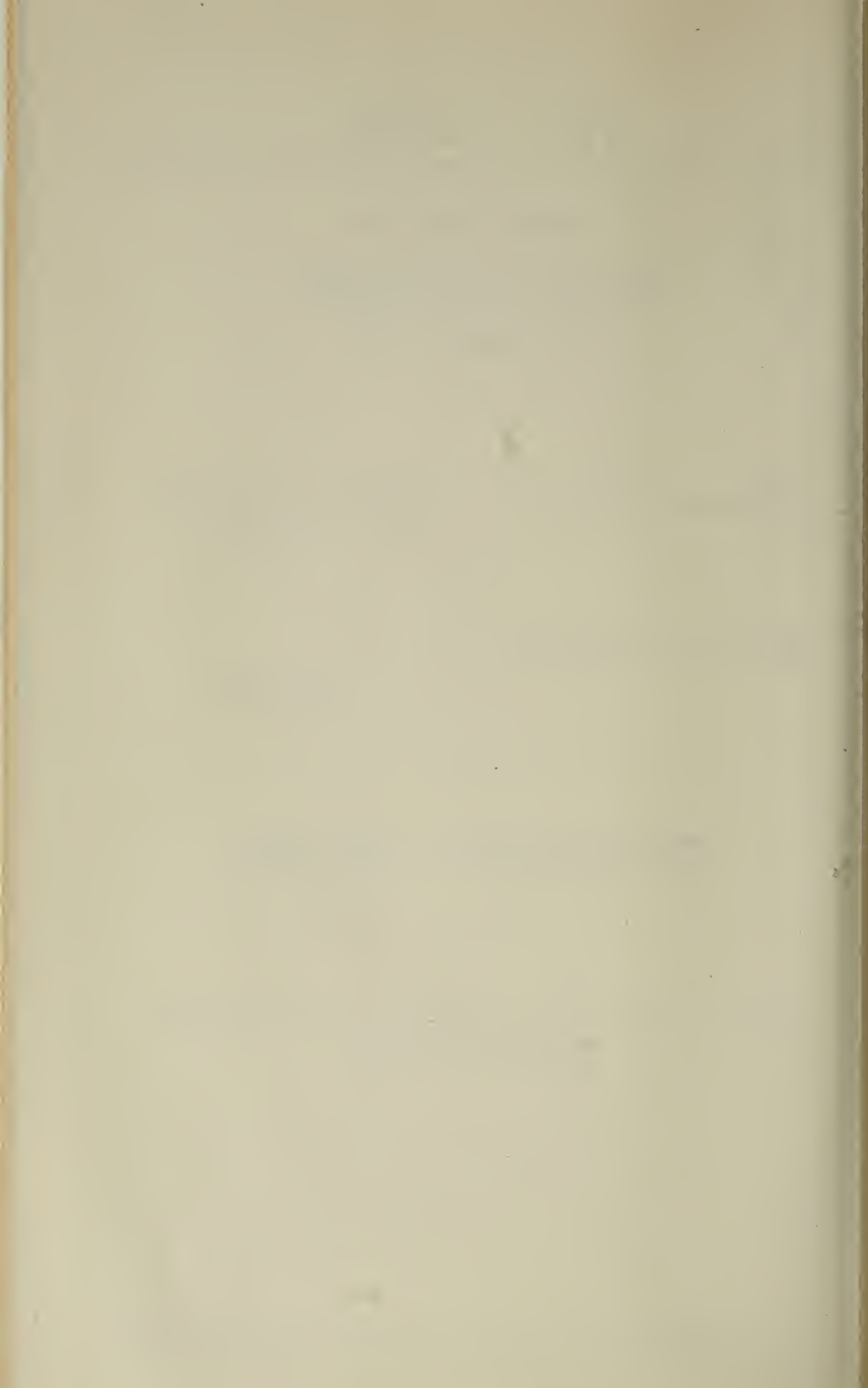
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled hereiñ accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

SIGVALD NIELSON, ESQ.,
HARRY R. HORROW, ESQ.,
DOUGLAS ERSKINE, ESQ.,
PHIL C. NEAL, ESQ.

For Respondent:

CHARLES W. NYQUIST, ESQ.

Docket No. 12316

EDWARD M. MILLS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1946

- Oct. 16—Petition received and filed. Taxpayer notified. Feed paid.
- Oct. 16—Request for hearing at San Francisco filed by taxpayer.
- Oct. 23—Copy of petition served on General Counsel.
- Nov. 27—Answer filed by General Counsel.
- Dec. 6—Copy of answer served on taxpayer. San Francisco, Calif.

1947

Mar. 28—Hearing set May 26, 1947 at San Francisco, Calif.

May 6—Joint motion for consolidation with docket 13032 and place on calendar at San Francisco, Calif., commencing 5/26/47 filed. 5/7/47 granted.

May 26—Hearing had before Judge Johnson on Merits. Stipulation of facts filed. Petitioner's brief due 7/10/47—respondent's 8/25/47—reply 9/24/47.

June 16—Transcript of hearing of 5/26/47 filed.

July 8—Motion for extension to August 10, 1947, to file brief filed by taxpayer. 7/9/47 granted.

Aug. 11—Motion for extension to Aug. 25, 1947, to file brief filed by taxpayer. 8/12/47 granted.

Aug. 13—Appearance of Phil C. Neal as counsel filed.

Aug. 25—Brief filed by taxpayer. 8/26/47 copy served.

Oct. 3—Reply brief filed by General Counsel.

Nov. 6—Motion for extension to Nov. 25, 1947, to file reply brief filed by taxpayer. 11/6/47 granted.

Nov. 24—Reply brief filed by taxpayer—copy served.

1949

Mar. 28—Findings of fact and opinion rendered, Johnson J. Decision will be entered for petitioner. 3/29/49 copy served.

1949

- Mar. 28—Decision entered Johnson J. Div. 10.
- June 21—Petition for review by U. S. Court of Appeals, 9th Circuit, filed by General Counsel.
- June 30—Proofs of service filed (2).
- July 7—Statement of points filed by General Counsel with statement of service by mail thereon.
- July 7—Notice re contents of record on review filed by General Counsel with statement of service by mail thereon.

Docket No. 13032

EDWARD M. MILLS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1947

- Feb. 11—Petition received and filed. Taxpayer notified. Fee paid.
- Feb. 11—Copy of petition served on General Counsel.
- Feb. 11—Request for Circuit hearing in San Francisco filed by taxpayer.

1947

- Mar. 19—Answer filed by respondent.
- Mar. 24—Copy of answer served on taxpayer—San Francisco, Calif.
- May 6—Joint motion for consolidation with docket 12316 and place on calendar at San Francisco, Calif., commencing 5/26/47 filed. 5/7/47 granted.
- May 7—Hearing set May 26, 1947, at San Francisco, Calif.
- May 26—Hearing had before Judge Johnson on merits. Stipulation of facts filed. Petitioner's brief due 7/10/47—respondent's 8/25/47—reply 9/24/47.
- June 16—Transcript of hearing of 5/26/47 filed.
- July 8—Motion for extension to August 10, 1947, to file brief filed by taxpayer. 7/9/47 granted.
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June 30—Proofs of service filed (2).

July 7—Statement of points filed by General Counsel with statement of service by mail thereon.

July 7—Notice re contents of record on review filed by General Counsel with statement of service by mail thereon.

The Tax Court of the United States

Docket No. 12316

EDWARD M. MILLS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT-ET-GT-257-43-44-First California—Donor, Edward M. Mills) dated August 9,

1946, and as a basis for this proceeding alleges as follows:

1. The petitioner is an individual with his business addressed at 343 Sansome Street, San Francisco, California. The returns for the periods here involved were filed with the Collector of Internal Revenue for the First District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked "Exhibit A") was mailed to petitioner on August 9, 1946.

3. The taxes in controversy are gift taxes for the calendar years 1943 and 1944 and the amounts in controversy are \$5,032.45 for the year 1943 and \$3,157.46 for the year 1944.

4. The determination of taxes set forth in the notice of deficiency is based upon the errors of the respondent in including the sum of \$25,366.44 in petitioner's total gifts for the year 1943 and the sum of \$17,033.14 in petitioner's total gifts for the year 1944.

5. The facts upon which petitioner relies are as follows:

(a) At all times herein mentioned and since July 29, 1927, petitioner and Edna Mills were, and they now are, husband and wife;

(b) At all times herein mentioned and since July 29, 1927, petitioner and Edna Mills were, and they now are, residents of the State of California;

(c) During the year 1939, petitioner and Edna Mills mutually agreed to divide equally the community property then owned by them and to con-

vert their shares of such community property into their respective separate properties in equal shares, and they further agreed that all property and income thereafter to be received by them which might otherwise be community property or income would be their respective separate properties in equal shares;

(d) During the year 1943, petitioner and Edna Mills received the sum of \$50,732.28 as compensation for the personal services of petitioner, of which, by virtue of the agreement mentioned in subparagraph (c) of this paragraph 5, \$25,366.44 was received as the separate income and property of Edna Mills, and the same amount was received as the separate income and property of petitioner;

(e) During the year 1944, petitioner and Edna Mills received the sum of \$34,066.28 as compensation for the personal services of petitioner, of which, by virtue of the agreement mentioned in subparagraph (c) of this paragraph 5, \$17,033.14 was received as the separate income and property of Edna Mills, and the same amount was received as the separate income and property of petitioner; and

(f) During the years 1943 and 1944, petitioner had no right, title or interest in or to said sum of \$25,366.14 or said sum of \$17,033.14 received by Edna Mills, and made no transfers of either of said sums during said years, and if any transfers of either of said sums were made, such transfers were based on a full and adequate consideration in money or money's worth.

Wherefore, petitioner prays that this court may hear this proceeding and determine that there are no deficiencies in gift taxes due from petitioner for the calendar years 1943 and 1944.

Dated: San Francisco, California, October 10, 1946.

/s/ SIGVALD NIELSON,
/s/ HARRY R. HORROW,
/s/ DOUGLAS ERSKINE,
Counsel for Petitioner.

State of California,
City and County of San Francisco—ss.

.Edward M. Mills, being duly sworn, says that he is the petitioner above-named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ EDWARD M. MILLS.

Subscribed and sworn to before me this 10th day of October, 1946.

[Seal] /s/ GERALDINE D. COHEN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Jan. 11, 1949.

EXHIBIT A

IRA:ET:GT:90-D-LAB

Aug. 9, 1946

MT-ET-GT-257-43-44-First California
Donor—Edward M. Mills

Mr. Edward M. Mills
343 Sansome Street
San Francisco, California

Dear Mr. Mills:

You are advised that the determination of your gift tax liability for the calendar years 1943 and 1944 discloses a deficiency of \$8,189.91 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States at its principal address for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, 7th Floor, 74 New Montgomery Street, San Francisco, California for the attention of Conference Section. The signing and filing of this form will expedite the closing of the return by permitting an early assessment of the deficiency, and will prevent the

accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner,

By F. M. HARLESS,

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of Waiver

GIFT TAX

San Francisco

IRA:ET:GT:90-D

LAB

MT-ET-GT-257-43-44-First California

Donor—Edward M. Mills

Calendar years—1943 and 1944

STATEMENT

Gift Tax Years	Liability	Assessed	Deficiency
1943	\$5,032.45	0.00	\$5,032.45
1944	3,157.46	0.00	3,157.46
Total	\$8,189.91		\$8,189.91

In making this determination of your Federal gift tax liability for the years 1943 and 1944, careful consideration has been given to the protest dated April 23, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. Harry R. Horrow, 225 Bush Street, San Francisco, 4, California.

Adjustment to Net Gifts
Year: 1943

Schedule A of return—

	Returned	Determined
(a) Total gifts, other than charitable, etc., 1943	0.00	\$25,366.44
(b) Less: Total exclusions.....	0.00	3,000.00
Total included amount of gifts.....	0.00	\$22,366.44

Schedule B of return—

Total charitable, etc., gifts.....	0.00	0.00
Less: total exclusions.....	0.00	0.00
	<hr/>	<hr/>
Included amount of charitable, etc., gifts	0.00	0.00
Total all gifts.....	0.00	\$22,366.44
Less: specific exemption.....	0.00	0.00
	<hr/>	<hr/>
Net gifts, 1943.....	0.00	\$22,366.44

Donor—Edward M. Mills

Statement

Explanation of Adjustments
Year: 1943

	Returned	Determined
Schedule A of return—		
Additional item—Gift to wife, Edna Mills	\$ 0.00	\$25,366.44
Exclusions	0.00	3,000.00
	<hr/>	<hr/>
	\$ 0.00	\$22,366.44

(a) It has been determined that one-half of your salary, or \$25,366.44 (1/2 of \$50,732.88) which was converted to separate property of your wife during the calendar year 1943, constitutes a taxable gift within the meaning of Article 86.2(c) of Regulations 108.

(b) One exclusion of \$3,000.00 is allowed with respect to the gift made.

Computation of Tax
Year: 1943

	Returned	Determined
1. Net gifts for 1943.....	\$ 0.00	\$ 22,366.44
2. Total gifts for preceding years....	102,407.11	142,407.11
	<hr/>	<hr/>
3. Total net gifts.....	\$102,407.11	\$164,773.55
	<hr/>	<hr/>
4. Tax on total net gifts.....	0.00	\$ 30,099.05
5. Tax on net gifts for preceding years	0.00	25,066.60
	<hr/>	<hr/>
6. Tax on net gifts for 1943.....	\$ 0.00	\$ 5,032.45
7. Total tax assessed for 1943.....		0.00
	<hr/>	<hr/>
8. Deficiency, 1943		\$ 5,032.45

Donor—Edward M. Mills

Statement

Adjustment to Net Gifts for Prior Years

	Returned	Determined
Net gifts for prior years.....	\$102,407.11	\$142,407.11

Explanation of Adjustments to Net Gifts for Prior Years

The determination of the amount of net gifts for prior years is based on the amount previously determined as total net gifts in connection with your return for the calendar year 1941.

Adjustments to Net Gifts

Year: 1944

Schedule A of return—

	Returned	Determined
(a) Total gifts, other than		
Charitable, etc., 1944.....	\$ 0.00	\$17,033.14
Less: total exclusions.....	3,000.00	3,000.00
	<hr/>	<hr/>
Total included amount of gifts..	0.00	\$14,033.14

Schedule B of return—

Total charitable, etc., gifts.....	\$ 0.00	0.00
Less: total exclusions.....	0.00	0.00
	<hr/>	<hr/>
Included amount of charitable, etc., gifts	0.00	0.00
Total all gifts.....	0.00	\$14,033.14
Less: Specific exemption.....	0.00	0.00
	<hr/>	<hr/>
Net gifts, 1944.....	\$ 0.00	\$14,033.14

Donor—Edward M. Mills

Explanation of Adjustments

Year: 1944

Statement

Schedule A of return—

	Returned	Determined
Additional item—Gift to Wife, Edna Mills.....	\$ 0.00	\$17,033.44
Exclusions	\$3,000.00	3,000.00
	<hr/>	<hr/>
	\$ 0.00	\$14,033.14

(a) It has been determined that one-half of your salary, or \$17,033.14 (1/2 of \$34,066.28) which was converted to separate property of your wife during the calendar year 1944, constitutes a taxable gift within the meaning of Article 86.2(c) of Regulations 108. One exclusion of \$3,000.00 is allowed with respect to the gift made.

Computation of Tax

Year: 1944

	Returned	Determined
1. Net gifts for 1944.....	\$ 0.00	\$ 14,033.14
2. Total net gifts for prior years....	142,407.11	164,773.55
	<hr/>	<hr/>
3. Total net gifts.....	\$142,407.11	\$178,806.69
4. Tax on total net gifts.....	0.00	33,256.51

5. Tax on gifts for prior years.....	0.00	30,099.05
6. Tax on net gifts for 1944.....	\$ 0.00	\$ 3,157.46
7. Total tax assessed for 1944.....		0.00
8. Deficiency		\$ 3,157.46

Received and filed Oct. 16, 1946, T.C.U.S.

[Title of Tax Court and Cause.]

Docket No. 12316

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits, denies and alleges as follows:

1. Admits that the petitioner is an individual with his business address at 343 Sansome Street, San Francisco, California; denies the remaining allegations contained in paragraph 1 of the petition.

2, 3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4. Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in paragraph 4 of the petition.

5 (a), (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

(c) Denies the allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d) Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition, and alleges that during the year 1943 petitioner received the sum of \$50,732.88.

(e) Admits that during the year 1944 petitioner received the sum of \$34,066.28; denies the remaining allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f) Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel,
T. M. MATHER,
W. J. McFARLAND,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed Nov. 27, 1946, T.C.U.S.

[Title of Tax Court and Cause.]

Docket No. 13032

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT-ET-GT-45-257-First California—Donor, Edward M. Mills) dated November 20, 1946, and as a basis for this proceeding alleges as follows:

1. The petitioner is an individual with his business address at 343 Sansome Street, San Francisco, California. The return for the period here involved was filed with the Collector of Internal Revenue for the First District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked "Exhibit A") was mailed to petitioner on November 20, 1946.

3. The tax in controversy is gift tax for the calendar year 1945 and the amount in controversy is \$2,807.77.

4. The determination of tax set forth in the notice of deficiency is based upon the following errors:

(a) The respondent erred in including the sum of \$15,479 in petitioner's total gifts for the year 1945.

(b) The respondent erred in determining that petitioner made net gifts for preceding years in the amount of \$178,806.69 or in any amount in excess of \$142,407.11.

5. The facts upon which petitioner relies are as follows:

(a) At all times herein mentioned and since July 29, 1927, petitioner and Edna Mills were, and they now are, husband and wife;

(b) At all times herein mentioned and since July 29, 1927, petitioner and Edna Mills were, and they now are, residents of the State of California;

(c) During the year 1939, petitioner and Edna Mills mutually agreed to divide equally the community property then owned by them and to convert their shares of such community property into their respective separate properties in equal shares, and they further agreed that all property and income thereafter to be received by them which might otherwise be community property or income would be their respective separate properties in equal shares;

(d) During the year 1943, petitioner and Edna Mills received the sum of \$30,958 as compensation for the personal services of petitioner, of which, by virtue of the agreement mentioned in subparagraph (c) of this paragraph 5, \$15,479 was received as the separate income and property of Edna Mills, and the same amount was received as the separate income and property of petitioner;

(e) During the year 1945, petitioner had no right, title, or interest in or to said sum of \$15,479 received by Edna Mills, and made no transfer of said sum during said year, and if any transfer of said sum was made, such transfer was based on a full and adequate consideration in money or money's worth;

(f) In arriving at the deficiency involved in this proceeding, respondent determined that petitioner made net gifts for preceding years in the amount of \$178,806.69. Said determination conforms with the amount determined by the respondent to be the total net gifts made by petitioner for the calendar year 1944, which determination is the subject of a petition before this Court bearing docket No. 12316. Petitioner's gift tax return for the year 1945 reported net gifts for preceding years in the amount of \$142,407.11. Petitioner alleges that the net gifts made by him for preceding years was not in excess of said amount of \$142,407.11.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in gift tax due from petitioner for the calendar year 1945.

Dated: San Francisco, California, February 6, 1947.

/s/ SIGVALD NIELSON,

/s/ HARRY R. HORROW,

/s/ DOUGLAS ERSKINE,

Counsel for Petitioner.

State of California,
City and County of San Francisco—ss.

Edward M. Mills, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein

are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ EDWARD M. MILLS.

Subscribed and sworn to before me this 3rd day of February, 1947.

[Seal] /s/ GERALDINE D. COHEN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Jan. 11, 1949.

EXHIBIT A

Office of
Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT-ET-GT-45-257-1st California

Donor—Edward M. Mills—Nov. 20, 1946.

Mr. E. M. Mills
343 Sansome Street
San Francisco, California

Dear Mr. Mills:

The determination of your gift tax liability for the calendar year 1945 discloses a deficiency of \$2,807.77 as shown in the attached statement.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within ninety days (not counting Saturday, Sunday or a legal holiday in the District of Columbia

as the ninetieth day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner.

By /s/ D. S. BLISS,

Deputy Commissioner.

Enclosures: 7585

Statement

Form of waiver

MT-ET-GT-45-257-1st California

Donor—E. M. Mills

STATEMENT

Calendar year 1945

The determined deficiency is computed as follows :

	Returned	Determined
Total gifts, 1945, other than charitable, etc., gifts.....	\$ 5,400.00	\$ 20,879.00
Less exclusions	3,000.00	6,000.00
	<hr/>	<hr/>
Amount of gifts included.....	2,400.00	14,879.00

Less specific exemption.....	0.00	0.00
Net gifts, 1945.....	2,400.00	14,879.00
Net gifts for preceding years.....	142,407.11	178,806.69
Total net gifts.....	144,807.11	193,685.69
Tax on total net gifts.....	\$ 25,606.60	\$ 36,604.28
Tax on net gifts for preceding years	25,066.60	33,256.51
Tax on net gifts, 1945.....	540.00	3,347.77
Tax shown on return.....		540.00
Deficiency, 1945		\$ 2,807.77

The determined deficiency results from the following adjustments:

Schedule A

Item 2	\$ 0.00	\$ 15,479.00
	Determined	Returned
Exclusions	\$ 6,000.00	\$ 3,000.00

Schedule C

	Returned	Determined
Net gifts for preceding years.....	\$142,407.11	\$178,806.69
To balance	48,878.58	

One-half of your salary, or \$15,479.00, which was converted to separate property of your wife during the calendar year 1945, is included herein as a gift pursuant to the provisions of Section 86.2(c) of Regulations 108 relating to gift tax. One exclusion of \$3,000.00 is allowed in connection with this gift.

Net gifts for preceding years are increased to conform with the amount heretofore determined as total net gifts for the calendar year 1944.

Received and filed Feb. 11, 1947. T.C.U.S.

[Title of Tax Court and Cause.]

Docket No. 13032

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney,

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4 (a), (b). Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5 (a), (b). For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

(c), (d), (e). Denies the allegations contained in subparagraphs (c), (d) and (e) of paragraph 5 of the petition.

(f). Admits the allegations contained in subparagraph (f) of paragraph 5 of the petition, except that respondent denies that the net gifts made by petitioner during the preceding years were not in excess of the amount of \$142,407.11.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel.

T. M. MATHER,

W. J. McFARLAND,

Special Attorneys,

Bureau of Internal Revenue.

Received and filed Mar. 19, 1947. T.C.U.S.

[Title of Tax Court and Cause.]

Docket Nos. 12316 and 13032

JOINT MOTION FOR CONSOLIDATION OF
PROCEEDINGS AND FOR PLACING ON
HEARING CALENDAR

Come now the parties to the above entitled proceedings, by their respective counsel, and move for an order of the Court to place the case of Edward M. Mills, docket No. 13032, on the hearing calendar at San Francisco, California, commencing May 26, 1947, and to consolidate the two proceedings, both in the case of Edward M. Mills, docket Nos. 12316 and 13032. In support of this motion the parties state:

1. The case of Edward M. Mills, docket No. 12316, is on the hearing calendar at San Francisco on May 26, 1947, and issue therein is the petitioner's gift tax liability for the years 1943 and 1944.

2. The case of Edward M. Mills, docket No.

13032, is not on any hearing calendar, and the issue therein is the petitioner's gift tax liability for the year 1945.

3. The two cases involve similar issues of fact and of law for different taxable years, and consolidation of the proceedings will save the time of the parties and of the Court.

Wherefore, the parties jointly pray that the Court will grant this motion.

/s/ HARRY R. HORROW,

Counsel for Petitioner.

/s/ J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Received and filed May 6, 1947. T.C.U.S.

[Stamped]: Granted The Tax Court of the U. S.
May 7, 1947.

/s/ J. E. MURDOCK,

Judge.

The Tax Court of the United States

Docket Nos. 12316, 13032

EDWARD M. MILLS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Room 417, Appraisers Building, 630 Sansome
Street, San Francisco, California. May 26,
1947, 2:00 p.m.,

(Met pursuant to notice.)

Before: Honorable Luther A. Johnson,
Judge.

Appearances:

PILLSBURY, MADISON & SUTRO,

By HARRY R. HORROW, ESQ.,

225 Bush Street,

San Francisco, California,

Appearing for the Petitioner.

CHARLES W. NYQUIST, ESQ.,

(HONORABLE J. P. WENCHEL,

Chief Counsel, Bureau of Internal
Revenue),

Appearing for the Respondent.

PROCEEDINGS

The Court: The Clerk will call the first case set.

The Clerk: Dockets Nos. 12316 and 13032, Edward M. Mills.

Mr. Horrow: Ready for the Petitioner.

Mr. Nyquist: Ready for the Respondent, your Honor.

The Court: Counsel, would you like to make a brief statement of the nature of the cases? It is to be submitted, as I understand, on statement of facts. Or, is there some oral testimony?

Mr. Horrow: Harry R. Horrow appears for the Petitioner. There will be some oral statements.

Opening Statement on Behalf
of the Petitioner,

By Mr. Horrow:

Mr. Horrow: These cases have been consolidated for trial, your Honor. They involve deficiencies in gift taxes for the years 1943, 1944, and 1945. The same questions are involved in each of those years. Those questions are whether the Petitioner made taxable gifts to his wife, and, if so, in what amounts.

The facts briefly are these, your Honor: In January of 1939 Petitioner and his wife were residents of California. They mutually agreed to divide the community property which they owned on December 31, 1938. They also agreed that the community property so divided would be thereafter held by each [*2] as his or her separate property.

. As a part of that same agreement they mutually agreed that thereafter one half of the salaries or other compensation for personal services would

* Page numbering appearing at top of page of original certified Transcript of Record.

belong to each as his or her separate property. This agreement was carried out throughout the years 1939 to the present time. One half of the salary or other compensation for personal services has been received, one half by Mr. Mills as his separate property, and one half by Mrs. Mills as her separate property.

For the years 1939 to 1942 no gift tax returns were filed covering the receipt of one half of the compensation by Mrs. Mills. Thereafter, for the years in question, gift tax returns were filed solely for the purpose of avoiding the imposition of penalties.

The Commissioner has determined that one half of the total compensation for the personal services rendered by Mr. Mills constituted a taxable gift to Mrs. Mills during the years 1943, 1944, and 1945. He has not held that any taxable gifts were made for the years prior to 1943 and apparently it is conceded that the receipt by the wife of one half of that compensation during those years did not constitute a taxable gift.

The Commissioner in holding that taxable gifts were made to the wife for the years 1943, 1944, and 1945, relies on the regulations that are set out, Regulation 108, Section 86.2C. Those Regulations are issued under Section 1000D, which [3] came into the law in the Revenue Act of 1942. The substance of this Act is that all gifts of community property shall be considered to be gifts of the husband except to the extent that the community property was

derived either from the separate property of the wife or personal services that were rendered by the wife.

Of course, in this case it is conceded that the wife did not render any personal services.

The Petitioner contends first of all that the Regulations do not apply. They deal in terms with a division of community property, and, secondly, they do not purport to apply to transfers that were made prior to January 1, 1943, which is the effective date of Section 1000D under which the Regulations to which I referred have been issued.

It is our further contention that if the Regulations do apply, they are invalid. There are a number of questions of law that relate to that; I won't go into those at this time, your Honor, but that briefly states our case.

The Court: Does Respondent's counsel desire to make a statement?

Opening Statement on Behalf
of the Respondent,

By Mr. Nyquist

Mr. Nyquist: Apparently the only actual dispute as to facts here is with respect to the exact terms of the 1939 agreement. Everything else, I believe, has been covered by [4] the stipulation and I believe the Petitioner will introduce evidence as to the terms of the agreement in 1939.

The Court: You mean by the 1939 agreement, the agreement mentioned by Petitioner's counsel with reference to the division of the property?

Mr. Nyquist: Yes, your Honor.

In that connection the stipulation covers the agreement as it applied to property which was then owned by the parties, but the stipulation of facts is silent as to the terms of the agreement as it applied to after acquired property.

Now the Respondent takes the position that there was no binding contract entered into in 1939 which effected a division of the property or earnings which the Petitioner had not at that time earned.

Respondent further believes that even assuming that the 1939 agreement may have created some sort of enforceable obligation concerning the future earnings, but nevertheless there was no completed gift, or completed transfer in 1939, that the completed gift was made in the years in which the Petitioner performed the services which produced the income and turned over half of the income to his wife as her separate property.

There is one point I would like to call to the Court's attention at this time: In Paragraph 3 of the stipulation the deficiencies as determined by the Commissioner for the years [5] 1943, 1944, and 1945 are set out. It is further stated that in his gift tax return for the years 1943 and 1944 the Petitioner inadvertently understated the total compensation for the personal services rendered by him in those years by the amounts of \$131.04 in each year. As a result of that understatement, the Commissioner in determining the amounts of the gifts and the

amounts of the tax due thereon as stated in the deficiency letter has determined amounts slightly less than the amounts that would be due under the Respondent's theory of the case if he had used the correct figures. And it is stated in it——

The Court: Whose error was it that the figures were not given correctly?

Mr. Nyquist: The error arose originally in the Petitioner's gift tax returns. I think it is explainable and it was inadvertent. But because of that error the deficiencies are slightly smaller than the amount which the Respondent now asserts and instead of going through the formalities of amending the pleadings, we have merely stated in the stipulation that the Respondent hereby asserts a claim for any increased deficiencies that may result from the Court's taking into account said corrected amounts.

I believe there will be no difficulty over that one.

Mr. Horrow: At this time, your Honor, I should like to file the stipulation of facts which have been entered into [6] these proceedings.

The Court: Stipulation of facts will be received and filed as part of the evidence of the record of the case.

Mr. Horrow: I will ask Respondent's counsel to produce the gift tax returns of Edward M. Mills for the years 1943, 1944, and 1945, and the donee's information returns for those years filed by Edna Mills.

Mr. Nyquist: I have with me the donor's re-

turns. I do not have the donee's information returns for those years.

Mr. Horrow: May it be understood, your Honor, that Petitioner could offer the original donee's returns in evidence for these years. I have copies of the returns for two of the years in question, but I thought it would be better to have the original returns in evidence.

The Court: You mean offer the original returns, then have photostatic copies substituted? Is that what you have in mind, or copies?

Mr. Horrow: I should like to offer in evidence as Petitioner's exhibits the original gift tax returns of Edward M. Mills for the years 1943, 1944, and 1945.

The Court: Without objection they will be admitted into evidence and marked Exhibits—what are they, three of them?

Mr. Horrow: Yes, your Honor.

The Court: They will be marked Exhibits 1, 2 and 3 [7] of the Petitioner.

(The returns above-referred to were received in evidence and marked Petitioner's Exhibits Nos. 1, 2, and 3.)

Mr. Horrow: I should also like to offer in evidence the donee's information returns filed by Edna Mills for the years 1943, 1944, and 1945.

The Court: Any objection?

Mr. Nyquist: In that connection I would like to ask for what purpose the donee's returns are being put in evidence?

Mr. Horrow: Those are returns that are required by law, your Honor, and they are simply to supplement the record. The donor's returns must be complemented by a donee's information return, and they are certainly relevant to the issues in these matters.

The Court: Well, the Court will admit it. I don't know what probative effect they will have, but they will be admitted into evidence.

How many?

Mr. Horrow: Three. They are not in the courtroom at the moment because Respondent's counsel does not have them in his files.

The Court: Are they going to be produced later?

Mr. Nyquist: If Petitioner wishes to put in his copies, I have no objection to them being offered.

The Court: Does Petitioner desire to do that?

Mr. Horrow: I prefer to put the originals in, your Honor.

The Court: Can they be had?

Mr. Nyquist: I can bring them over tomorrow.

The Court: They will be admitted in evidence and they can be later marked for exhibits as Petitioner's Exhibits Nos. 4, 5, and 6.

(Donee's returns above-referred to were received in evidence and marked Petitioner's Exhibits Nos. 4, 5, and 6.)

Mr. Horrow: At this time I shall call Edward M. Mills as a witness.

Whereupon,

EDWARD M. MILLS

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Court: What are your initials, Mr. Mills?

The Witness: Edward M. Mills.

Direct Examination

By Mr. Horrow:

Q. Will you state your name and address for the record, Mr. Mills?

A. My business address is 343 Sansome Street; I live at Woodside. [9]

Q. Mr. Mills, I show you the stipulation of facts that has been filed in this proceeding. Will you refer to Paragraph 6 of that stipulation?

A. Yes, sir.

Mr. Horrow: This is just for your information, your Honor; it is very short.

Q. (Continuing) On or about January 1, 1939, Petitioner and Edna Mills entered into an oral agreement, one of the terms of which was an agreement to divide equally all the community property owned by them on December 31, 1938, and that thereafter each of said spouses would hold and own one half of said community property as his or her respective separate property.

Now, was there any agreement or understanding entered into between yourself and Mrs. Mills with respect to salary or compensation for services to be received? A. Yes, sir.

(Testimony of Edward M. Mills.)

Q. Will you state that understanding or agreement, Mr. Mills?

A. I had always divided my salary with my wife for many years and that was continued under this agreement.

The Court: What business were you in, Mr. Mills?

The Witness: Beg pardon?

The Court: What business were you in, Mr. Mills?

The Witness: Part of the time with the Rayonier, Incorporated and the rest of the time with Crown Zellerbach [10] Company.

The Court: What nature was it?

The Witness: Selling pulp.

By Mr. Horrow:

Q. Now with respect to the agreement to divide equally all the community property referred to in Paragraph 6, will you state whether that division took place?

A. It did, sir, month by month.

Q. I am referring, Mr. Mills, to the community property which was owned on December 31, 1938.

A. That was divided with my wife physically. She received certain securities and I kept certain securities.

Q. And were those securities placed in her name? A. Yes, sir.

Q. Were the securities which were kept as your one half of the property kept in your name?

(Testimony of Edward M. Mills.)

A. Yes, sir, in separate books and physically so.

Q. Were the securities in the name of your wife considered to be her separate property thereafter?

A. Yes, sir.

Q. And were the securities kept in your name considered to be your separate property thereafter?

A. Yes, sir.

Q. Was the same true with respect to the salary and compensation for services?

A. The salaries and compensation for services were [11] equally divided with the exception of one or two errors of Directors' fees.

Q. And that was pursuant to the agreement entered into on January, 1939?

A. It was, sir.

Q. And one half of the salaries or compensation was to be your wife's separate property?

A. That is right, sir.

Q. And one half was to be your separate property? A. Yes, sir.

Q. How long was that agreement to continue, Mr. Mills?

A. For the rest of our lives, as far as I know, sir.

Q. Was it in effect from 1939 to the present time?

A. I think so; yes, sir, I am sure.

Q. Did you have any intention of making any gifts to Mrs. Mills in 1943, 1944, and 1945?

A. No, sir.

Mr. Horrow: That is all, your Honor.

The Court: Any questions by Respondent's counsel?

(Testimony of Edward M. Mills.)

Mr. Nyquist: Yes, your Honor.

Cross-Examination

By Mr. Nyquist:

Q. Mr. Mills, you have testified generally as to your impression of the effect of the agreement between yourself and Mrs. Mills in 1939 without making any definite statements as to [12] the wording or terms of that agreement.

I would like to have you state the wording or terms of that agreement as best you can recall them.

A. Accountants and lawyers were employed at the time and she was to have half of it and I was to have half of it.

Q. Was the agreement put in writing?

A. No, sir.

Q. Was it an agreement in formal language such as a contract which a lawyer might draw up, or was it an informal agreement such as a man might ordinarily have with his wife?

Mr. Horrow: Your Honor, I object to that as being argumentative.

Mr. Nyquist: May it please the Court, we have just vague testimony concerning the agreement without any of its provisions being stated and apparently the witness is unable to recall the exact provisions of the agreement. I am trying to bring out that.

The Court: You can cross-examine and show what was said or done. I don't know whether there

(Testimony of Edward M. Mills.)

was any fixed standard by which one was made of it. I don't know if the witness would know how to pass on answering that question.

Mr. Nyquist: The point I am trying to point out is, did Mr. and Mrs. Mills sit down across the table and draw up or arrange orally an agreement?

The Court: Ask him about that and let us find out. [13] Ask the witness about that.

Mr. Nyquist: Yes, your Honor.

Q. (By Mr. Nyquist): Mr. Mills, did you and Mrs. Mills exchange formal words in the nature of an oral contract?

Mr. Horrow: Your Honor, I am sorry—

Mr. Nyquist: (Continuing) or did you—or was it merely a general understanding that was reached by you from the surrounding circumstances and over a period of time without the use of specific words?

Mr. Horrow: Your Honor, I think that calls for a conclusion. It is argumentative.

Mr. Nyquist: Your Honor, the whole testimony of this witness was a conclusion.

The Court: I think cross-examination has a pretty wide latitude. The witness can disagree or agree with him as he thinks the facts warrant.

A. The discussion—a discussion took place in the drawing of my will which occurred about that time. We decided to keep on dividing the assets 50-50, as it were.

Q. (By Mr. Nyquist): You mean it was the

(Testimony of Edward M. Mills.)

understanding between you and Mrs. Mills you would continue as you had been doing before, dividing your—— [14] A. Absolutely.

Q. And when you were asked on Direct Examination how long that was to continue, your reply was, “For the rest of our lives, as far as I know.” By that did you mean there was nothing definite said at that time as to how long it was to continue?

A. No, sir; nothing definite said. It was to be a final settlement between us.

Q. Do you recall whether the phrase “salary and other compensation for personal services” was used by either you or Mrs. Mills in reaching that agreement?

A. The phrase was used, I believe, and referred to salaries and directors’ fees.

Q. Did you use those words, “salary and other compensation for personal services”?

A. I don’t think we used direct salaries; salaries and directors’ fees alone.

The Court: I didn’t understand what the witness said.

The Witness: I think we used, “salaries and directors’ fees.”

The Court: Instead of “salaries and other compensation” you said “salaries and directors’ fees”?

The Witness: Yes, sir.

The Court: Was that the income you had at that time? [15]

The Witness: There were also returns on the investments.

(Testimony of Edward M. Mills.)

The Court: But the only salaries and directors' fees you were talking about?

The Witness: That was the only known means of compensation outside of dividends and interest.

Q. (By Mr. Nyquist): Mr. Mills, in the affidavit which you attached to your 1943 gift tax return, you stated: "And agreed that all income to be received thereafter from salary and other compensation for personal services which would otherwise have been received as our community income should be received by each as his or her separate income or property."

Mr. Horrow: Excuse me, I think if you have no objection I would like to show Mr. Mills the affidavit so he can keep in mind the language to which you have referred.

Mr. Nyquist: I have no objection.

The Court: From what are you reading?

Mr. Nyquist: I am reading from a copy of an affidavit which accompanied Mr. Mills' gift tax return from 1943 which is in evidence.

The Court: All right.

Q. (By Mr. Nyquist): When you made that affidavit in 1943, Mr. Mills, and used the phrase "salary and other compensation for personal [16] services," were you trying to quote the exact words of an agreement entered into between you and Mrs. Mills or merely a general statement of your impression of the effect of that agreement?

A. As far as I remember, Sir, there was no com-

(Testimony of Edward M. Mills.)

compensation for personal services other than directors' fees and salaries at that time.

Q. Perhaps I didn't make my question entirely clear.

The Court: I think the witness' answer was responsive. As he said a moment ago, the only thing he remembered definitely as to language used was that in specifying, salaries and directors' fees were specifically mentioned. Is that what you understood?

The Witness: Yes, your Honor.

The Court: That covered everything that came in except dividends and they didn't come under "salary or compensation"?

Q. (By Mr. Nyquist): In other words, the language used in your affidavit does not purport to be the exact language of your agreement with Mrs. Mills but merely your recollection of the substance?

A. That's right, sir.

Q. Mr. Mills, what was the occasion for this agreement in 1939?

A. I think I had been apprised of a change in income tax [17] act, whatever it was, and that the division of salaries I had been making was more or less questioned by them. I am not quite sure; that is my impression now.

Q. Was Mrs. Mills employed in 1939?

A. No, sir.

Q. And did you in 1939 contemplate she would ever be employed or have personal compensation?

(Testimony of Edward M. Mills.)

A. No, sir; I hope not!

Q. Did your 1939 agreement cover all future income to be received by either of you or merely the compensation for personal services?

A. The compensation for personal services, sir. The assets had been divided and taxes paid where necessary.

Q. Mr. Mills, it has been stipulated that each month you received your salary as an officer of Rayonier, Incorporated, in two equal monthly installments and that one of the checks each month was endorsed by you or your secretary to Mrs. Mills and deposited in her separate account.

A. I think that was the way it was done, possibly, but I never knew just what I got.

Q. I see.

Well, was it your intention that these checks that were endorsed to Mrs. Mills and deposited in her account, should become the separate property of Mrs. Mills? A. Yes, sir. [18]

Mr. Nyquist: No further questions.

The Court: Prior to the agreement that Counsel has been interrogating you about, between you and your wife, as to division, did I understand you to say it had been your practice to divide your salary with your wife before that time?

The Witness: The salary, yes, sir, entirely.

The Court: For how long a time?

The Witness: Twenty years or so, I think.

The Court: Every month, your wife would get half your salary?

(Testimony of Edward M. Mills.)

The Witness: Maybe only 15 years, but it is a long time.

The Court: That is a long time.

The Witness: Yes, sir.

The Court: There is no change in regard to this division in your agreement, but you said you made the agreement because there was a change in the law that might necessitate some formal agreement made. Was the reason on advice of counsel?

The Witness: I think so, your Honor.

The Court: In addition to your salary from the bank, did you receive any other salary?

The Witness: The only salary I received was as Director and President of the Rayonier and Vice President of Crown Zellerbach. [19]

The Court: And the other property—your stocks and bonds and securities—they had already been divided or were divided at that time?

The Witness: They were divided with the consent of the Treasury Department, I understood.

The Court: That is all.

Redirect Examination

By Mr. Horrow:

Q. Mr. Mills, prior to 1939 were there questions raised by the Bureau of Internal Revenue as to what was your separate property and what was your community property?

A. By 1929 it had been settled. Some years before questions had been raised.

Q. You meant "1939"?

A. Yes, sir.

(Testimony of Edward M. Mills.)

Q. 1939. Was it your purpose in entering into this agreement in 1939 to eliminate controversy on community property? A. Yes, sir.

Q. And referring again to stipulation, Mr. Mills, Paragraph 6, the division of your community property owned on December 31, 1938, one-half of that community property was to be your wife's separate property, is that correct? A. Yes, sir.

Q. And was one-half of the salary and compensation likewise [20] to be separate property?

A. Of the salary and personal earnings?

Q. It was to be separate property?

A. Yes, it was.

Q. And you said that the agreement was to continue throughout the rest of your lives? Did you understand that you could terminate that agreement without your wife's consent?

A. No, sir.

Mr. Horrow: That is all, your Honor.

The Court: Did your wife have any earnings? Was she ever employed?

The Witness: No, sir. She brought up our children.

The Court: That is all.

Mr. Horrow: That completes Petitioner's case, your honor. Petitioner rests.

The Court: Stand aside, Mr. Mills.

Any evidence to be offered by the Respondent?

Mr. Nyquist: The Respondent rests, your Honor.

The Court: The usual time for filing briefs will be sufficient?

Mr. Horrow: If your Honor please, we would like 45 days for reply in view of the mailing situation; otherwise, briefs under the rules would be agreeable.

Mr. Nyquist: Your honor, inasmuch as I contemplate that the Petitioner intends to make an attack on the validity [21] of the Regulations, I would like to request that instead of filing simultaneous briefs, the Petitioner file his brief first, making his attack on the Regulations and then the Respondent reply.

Mr. Horrow: We have no objection to that, your Honor.

The Court: How much time would the Petitioner want to file his other brief?

Mr. Horrow: Forty-five days with 45 days for reply, if agreeable.

The Court: That is a bit longer than we usually allow. Wouldn't 30 days for reply be adequate?

Mr. Horrow: We find, your Honor, that it takes about 15 days to be served with a copy of the Respondent's brief.

The Court: Is that agreeable with the Respondent's counsel: 45 and 45?

Mr. Nyquist: As I understand it, that would be 45 days for Petitioner and 45 days thereafter for reply?

The Court: Yes. You wouldn't want any more

than 45, would you, to reply to that? It would take us to Christmas.

Mr. Horrow: No, your Honor. Forty-five and 45 and 45.

The Court: I think we better cut out that last 45. [22] Make it 45, 45 and 30.

Mr. Horrow: Thank you, your Honor.

(Whereupon, at 2:35 o'clock p.m., the hearing in the above-entitled matter was closed.)

Filed T.C.U.S. June 16, 1947. [23]

[Title of Tax Court and Cause.]

Docket No. 12316 and Docket No. 13032

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys that the following facts shall be taken to be true and received as evidence for all purposes of this proceeding, subject to the right of either party to introduce any further evidence not inconsistent with or contrary to the facts herein stipulated.

1. The petitioner is Edward M. Mills, an individual with his business address at 343 Sansome Street, San Francisco 4, California. Petitioner's gift tax returns for the calendar years 1943, 1944, and 1945 were filed with the Collector of Internal Revenue for the First District of California.

2. The notices of deficiency involved in these proceedings were mailed to petitioner on August 9, 1946, and November 20, 1946, respectively.

3. The deficiencies determined by the Commissioner are in gift taxes for the calendar years 1943, 1944, and 1945 in amounts as follows:

1943—\$5,032.45; 1944—\$3,157.46; 1945—\$2,807.77.

In his gift tax returns for the years 1943 and 1944 the petitioner inadvertently understated the total compensation for personal services rendered by him in such years by the amounts of \$131.04 in each year, the correct amounts being \$50,863.92 for the year 1943 and \$34,197.32 for the year 1944. Respondent hereby asserts a claim for any increased deficiencies that may result from the Court's taking into account said correct amounts.

4. At all times since July 29, 1927, petitioner and Edna Mills were and they now are husband and wife.

5. At all times since July 29, 1927, petitioner and Edna Mills were and they now are residents of the State of California.

6. On or about January 1, 1939, petitioner and Edna Mills entered into an oral agreement, one of the terms of which was an agreement to divide equally all the community property owned by them on December 31, 1938, and that thereafter each of said spouses would hold and own one-half of said community property as his or her respective separate property.

7. Pursuant to said agreement, the community

property owned by petitioner and Edna Mills on December 31, 1938, was equally divided. The community property on said date consisted of various stocks and bonds in the names of petitioner or petitioner and Edna Mills jointly. Pursuant to the agreement referred to in paragraph 6, one-half of said stocks and bonds were transferred to Edna Mills and were thereafter held in her name. Separate books of account were kept for petitioner and Edna Mills at all times mentioned herein. In the books of account of petitioner, the following entry dated January 1, 1939, appears: "To transfer to Edna Mills her one-half interest in the community property at December 31, 1938," followed by a list of the securities so transferred to Edna Mills, which were carried on petitioner's books of account at the amount of \$270,963.13. At all times mentioned herein the petitioner maintained bank accounts in his separate name, into which was received his separate income. At all times mentioned herein Edna Mills maintained bank accounts in her separate name, into which was received her separate income.

8. Pursuant to said agreement referred to in paragraph 6 hereof, all salary and other compensation received for personal services rendered by petitioner since January 1, 1939, has been received as hereinafter set forth. No salary or other compensation has been received for personal services rendered by Edna Mills at any time mentioned herein and throughout the taxable years in ques-

tion. Since January 1, 1939, and during the years 1943, 1944, and 1945, petitioner was an officer and director of Rayonier Incorporated and a director of Crown Zellerbach Corporation. His salary as said officer was payable in equal semimonthly installments, and deductions were made therefrom for the Federal Old Age Benefit tax imposed on employees, the State of California unemployment insurance tax imposed on employees, the federal withholding tax on wages, group insurance premiums, and for the purchase of United States Savings Bonds, Series E. Checks covering these semimonthly payments of salary after said deductions were made payable to petitioner. One of said checks for each month was deposited by petitioner's secretary in the separate bank account of petitioner. The other check for each month was endorsed by petitioner's secretary on behalf of petitioner to the order of Edna Mills and deposited by petitioner's secretary in the separate bank account of Edna Mills. As used herein, the term "separate bank account" refers to an account in which the amounts on deposit are owned and held as separate property. Petitioner was covered by a group life insurance policy for which premiums were deducted from salary payments. These deductions were made in the case of the salary payments deposited in the separate account of Edna Mills. During each of the taxable years 1943, 1944, and 1945 deductions from salary payments were made for the purchase of United States Savings Bonds, Series E. Deduc-

tions for the purchase of bonds totaled \$4,800 in each year, of which \$2,400 was expended to purchase Series E bonds issued to petitioner in his name and \$2,400 was expended to purchase Series E bonds issued to Edna Mills in her name. Checks for the director's fees were deposited in the separate bank account of petitioner and at the end of each year one-half of the amounts received as director's fees in such year was credited to Edna Mills and charged against petitioner. Appropriate credits and charges were also made from time to time to equalize the amounts of salary checks received by petitioner and Edna Mills, respectively, and to equalize the deductions therefrom for withholding taxes and the State of California unemployment insurance tax. The Federal Old Age Benefit tax was treated as chargeable solely to petitioner, and Edna Mills was credited for the deductions from her checks on account of Federal Old Age Benefit tax. The amounts of federal withholding and victory tax withheld from the salary checks received by Edna Mills, less adjustments made to equalize such taxes with those withheld from checks received by petitioner, were taken as credits by Edna Mills against her federal income tax liability.

9. The total compensation for the personal services rendered by petitioner for the years 1943 to 1945, inclusive, was as follows:

Salary, Rayonier, Incorporated, 1943, \$50,623.92; 1944, \$33,957.32; 1945, \$30,738.00.

Director's fees, 1943, \$240.00; 1944, \$240.00; 1945, \$220.00.

Total, 1943, \$50,863.92; 1944, \$34,197.32; 1945, \$30,958.00.

The amounts of the salary payments made by Rayonier, Incorporated, and the director's fees paid to petitioner and to Edna Mills for each of the years 1943 to 1945, inclusive, the deductions with respect to the salary payments made by Rayonier, Incorporated, and the amounts debited and credited on the books of account of petitioner and Edna Mills to equalize salary payments and deductions therefrom for each of the years 1943 to 1945, inclusive, were as set forth in Exhibit A attached hereto and made a part hereof.

In arriving at the deficiencies involved in these proceedings, respondent determined that the petitioner made taxable gifts to Edna Mills in the amounts of one-half of the total compensation for personal services rendered by petitioner for each of said years. The Commissioner erroneously determined that one-half of said total compensation for the years 1943 and 1944 were the amounts of \$25,366.44 and \$17,033.14, respectively, instead of the amounts of \$25,431.96 for 1943 and \$17,098.66 for 1944.

10. Petitioner and Edna Mills filed separate federal income tax returns for each of the calendar years 1939 to 1945, inclusive. Petitioner included in his separate returns one-half of the salary and other compensation for personal services rendered by him, and Edna Mills included in her separate returns one-half of said salary and other compensation.

11. For the year 1943 the total amount of petitioner's net gifts for preceding taxable years was \$142,407.11. For the year 1944 the total amount of petitioner's net gifts for preceding taxable years was \$142,407.11, plus the amount of any taxable gifts that may be determined herein for the year 1943. For the year 1945 the total amount of petitioner's net gifts for preceding taxable years was \$142,407.11, plus the amount of any taxable gifts that may be determined herein for the years 1943 and 1944. In arriving at petitioner's net gifts for preceding taxable years, the respondent has not treated the receipt by Edna Mills of any of the compensation for personal services of petitioner during the years 1939 to 1942, inclusive, as taxable gifts by petitioner.

Dated: San Francisco, California, May ,
1947.

/s/ SIGVALD NIELSON,

/s/ HARRY R. HORROW,

/s/ DOUGLAS ERSKINE,

Counsel for Petitioner.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Coun-
sel for Respondent.

[Title of Tax Court and Cause.]

Docket Nos. 12316, 13032

REPORT OF TAX COURT

Promulgated March 28, 1949

Gift Tax.—Taxpayer and his wife were residents of California, and each month he paid to his wife one-half of his salary as received. Held, that under the community property laws of California the title to one-half of his salary as earned vested in his wife and payments of same to her were not subject to a gift tax within the purview of section 1000 (d), Internal Revenue Code. [Sec. 453, Rev. Act 1942] Sec. 86.2, Regulations 108 in part disapproved.

Harry R. Horrow, Esq., for the petitioner.

Chas. W. Nyquist, Esq., for the respondent.

These proceedings were consolidated. Respondent determined deficiencies in petitioner's Federal gift tax for the years 1943, 1944 and 1945, as follows:

1943	\$5,032.45
1944	3,157.46
1945	2,807.77

The question involved is whether or not petitioner made gifts to his wife during the taxable years which are taxable within the purview of section 1000(d), Internal Revenue Code.

Findings of Fact

The stipulation of facts filed herein we adopt, and from which, together with oral testimony and exhibits introduced at the hearing, we find that:

of them would own and hold the one-half of said community property so allotted and delivered to each as his or her separate property.

The agreement did not include or relate to the future salary and earnings of the petitioner. Petitioner for many years prior thereto had each month voluntarily and without any obligation so to do paid to his wife one-half of his salary, and it was understood that he would continue so to do, but there was no agreement or binding obligation that he would do so, and the payments of salary as received by him from his employer continued to be the community property of himself and his wife.

Their community property on December 31, 1938, consisted of various stocks and bonds in the names of petitioner or petitioner and Edna Mills, jointly, and pursuant to the agreement these were equally

Petitioner is an individual residing in San Francisco, California, and seasonably filed his gift tax returns for the years 1943, 1944 and 1945 with the collector of internal revenue for the first district of California.

Petitioner is married and he and his wife, Edna Mills, are now, and have at all times since July 29, 1927, been husband and wife and residents of California.

On or about January 1, 1939, petitioner and his wife entered into an oral agreement by which they divided equally between them all community property owned by them on December 31, 1938, with the understanding and agreement that thereafter each

divided, one-half of same being transferred to Edna Mills and thereafter held in her name and one-half in the name of petitioner. Separate books of account were then set up and thereafter kept for petitioner and his wife. In his appears this entry, dated January 1, 1939:

To transfer to Edna Mills her one-half interest in the community property at December 31, 1938,

followed by a list of the securities so transferred to Edna Mills, which were carried on petitioner's books of account at the amount of \$270,973.13. At all times thereafter separate bank accounts were kept for petitioner and his wife and the separate income of each was deposited to the credit of each in their respective bank accounts.

Continuously since January 1, 1939, and prior thereto one-half of petitioner's salary as received by him has been delivered by him to his wife. During said time petitioner has been an officer and director in one corporation and a director in another. His salary as such officer was payable in equal semi-monthly installments after deductions were made therefrom for Federal old age benefit tax imposed on employees, the State of California unemployment insurance tax, the Federal withholding tax on wages, group insurance premiums, and for the purchase of U. S. Savings Bonds, Series E. Continuously since January 1, 1939, checks covering these semi-monthly payments of salary, after these

deductions, were delivered and made payable to petitioner. One of the checks for each month was deposited by petitioner's secretary in his separate bank account and the other was indorsed by petitioner's secretary on his behalf to the order of his wife and deposited by his secretary in his wife's separate bank account.

During 1943, 1944 and 1945, the deduction from salary payments to petitioner with which to purchase U. S. Savings Bonds totaled \$4,800 in each year, of which \$2,400 was expended to purchase such bonds in petitioner's name and \$2,400 to purchase such bonds in his wife's name. Checks for director's fees were deposited in petitioner's separate bank account and at the end of each year adjustment was made so that one-half of same was credited to his wife. The Federal old age benefit tax was treated as chargeable solely to petitioner, and his wife was given credit for such deductions.

The total compensation received for personal services rendered by petitioner for the years 1943 to 1945, inclusive, was as follows:

Salary, Rayonier, Incorporated, 1943, \$50,623.92; 1944, \$33,957.32; 1945, \$30,738.00.

Director's fees, 1943, \$240.00; 1944, \$240.00; 1945, 220.00.

Total, 1943, \$50,863.92; 1944, \$34,197.32; 1945, \$30,958.00.

In arriving at the deficiencies involved in these proceedings, respondent determined that the petitioner made taxable gifts to Edna Mills in the amounts of one-half of the total compensation re-

ceived for personal services rendered by petitioner for each of said years. The Commissioner admits that he erroneously determined that one-half of said total compensation for the years 1943 and 1944 were the amounts of \$25,366.44 and \$17,033.14, respectively, instead of the amounts of \$25,431.96 for 1943 and \$17,098.66 for 1944.

Petitioner and Edna Mills filed separate Federal income tax returns for each of the calendar years 1939 to 1945, inclusive. Petitioner included in his separate income tax returns one-half of the salary and other compensation for personal services rendered by him, and Edna Mills included in her separate income tax returns one-half of said salary and other compensation.

For the years 1943 the total amount of petitioner's net gifts for preceding taxable years was \$142,407.11; for 1944 and 1945 the same amount, plus the amount of any taxable gifts that may be determined herein.

In arriving at petitioner's net gifts for preceding taxable years, the respondent did not treat the receipt by Edna Mills (his wife) of any of the compensation for personal services of petitioner during the years 1939 to 1942, inclusive, as taxable gifts by petitioner, although petitioner in each of said years did deliver to his wife one-half of his salary and all compensation received by him. Neither did the respondent contend that the compensation payments made by petitioner to his wife from 1939 to 1942, inclusive, constituted taxable gifts, and petitioner filed no gift tax returns therefor.

To prevent imposition of penalty, petitioner filed gift tax returns for each of the years 1943, 1944 and 1945, setting out the facts and the amounts contributed to his wife, but claiming therein that there was no gift tax due.

Respondent's notice of deficiency to petitioner for the calendar year 1943 contained this statement:

(a) It has been determined that one-half of your salary, or \$25,366.44 ($1\frac{1}{2}$ of \$50,732.88) which was converted to separate property of your wife during the calendar year 1943, constitutes a taxable gift within the meaning of Article 86.2(c) of Regulations 108.

Respondent's deficiency notices to petitioner for 1944 and 1945 each contained a statement identical with above, except in the one for 1944 one-half of petitioner's salary was alleged to be \$17,033.14, and in the one for 1945 one-half of petitioner's salary was given as \$15,479.

Opinion

Johnson, Judge:

Did the delivery by petitioner to his wife, during the years 1943, 1944 and 1945, of one-half of his salary and personal earnings as the same were paid to him constitute a taxable gift within the purview of section 1000(d), Internal Revenue Code?¹ This

¹[Sec. 1000(d)].

(d) Community Property—All gifts of property held as community property under the law of any State, Territory or possession of the United States, or any foreign country, shall be considered to be

was section 453 of the Revenue Act of 1942 and was applicable to gifts made in the calendar year 1943 and succeeding years. The Revenue Act of 1948 repealed the section by limiting its applicability to gifts made before the enactment of the Revenue Act of 1948. [April 2, 1948]

The substantial portion of section 1000(d) as here pertinent provides that:

All gifts of property held as community property under the law of any state * * * shall be considered to be the gifts of the husband * * *.

Respondent impliedly concedes, and correctly so, that unless the transactions here involved are covered by section 1000(d), there is no gift tax liability. He asserted no gift tax liability on the transfer by petitioner in 1939 of one-half of the entire community estate to his wife, nor on the transfer to her of one-half of his personal earnings in each of the years from 1939 to 1942, inclusive, for the obvious reason that under the community property laws of California since 1927, all of the property so delivered by the petitioner to his wife already be-

the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife. This subsection shall be applicable only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948.

[Note: The underscored sentence was added by the Revenue Act of April 2, 1948.]

longed to her and was her property in which she had a "present vested interest." *United States v. Malcolm*, 282 U.S. 792; *Commissioner v. Harmon*, 323 U.S. 44; *Paul C. Cavanagh*, 42 B.T.A. 1037. The same is true of the payments in question. The salary and compensation of petitioner was community property, and the one-half of same which he delivered to his wife was her property, not his.

No case is cited and none has come to our attention where a Federal gift tax has been imposed or sought to be imposed upon the husband in California for transferring to his wife one-half of his salary or other community property belonging to them, provided the transaction occurred, or related to property acquired, subsequent to July 29, 1927, when the California law was amended to make the wife's interest in the community property "present, existing and equal," (see section 161(a) Civil Code of California) rather than a "mere expectancy" as the prior law had been construed to mean.

If similar payments in the same manner made by petitioner to his wife prior to 1943 were not subject to a gift tax, evidently because the sums so paid already belonged to her and could not be the subject of a gift, why were the payments in controversy not in the same category?

The respondent contends that the enactment of section 1000(d) caused these payments after 1942 to become taxable gifts. We do not think so. They were not gifts and hence do not come within the purview of section 1000(d). This section is predi-

cated upon the existence of a gift. Under its own terms it specifically relates to and is based upon "all gifts of property held as community property." [Underscoring ours.] It applies only when there is a gift of property. The section nowhere defines nor attempts to change or impose any new meaning of the word "gift." What constituted a gift before its enactment remained the same after it became law. The only change that it made in the Federal gift tax law was to decree that when a "gift of community property" was made it "shall be considered to be the gift of the husband." In other words, the husband would be deemed the sole donor and the gift tax upon the transaction would be taxable to him alone, rather than divisible between him and his wife. We think it clear that in the absence of a gift section 1000(d) can not be invoked.

But respondent says the section is here applicable because the language of a regulation issued by the Treasury Department fits these transactions, and in his letter of deficiency cites and relies upon Treasury Regulation 108, section 86.2, wherein the Treasury interprets section 1000(d) to apply:

* * * to a division of community property between husband and wife into the separate property of each, and to a transfer by the husband and wife of any part of such community property into the separate property either of the husband or of the wife. * * *

If this were the language of the Code, a different question would be here presented, but we agree with

petitioner that the regulation as here applied can not be sustained as valid, it being an unwarranted expansion and enlargement of the meaning of section 1000(d). The language and effect of the regulation, as construed by respondent, is to make any division of community property, equal or otherwise, between husband and wife taxable as a gift. Since the section in question is restricted to gifts of property, the regulation can not enlarge its meaning so as to apply to a transaction other than a gift. The language of the regulation or its import making taxable a division of community property between husband and wife is not contained in the section or elsewhere in the Internal Revenue Code. Congress may have the power to make such divisions of community property taxable, but it has not done so, and the Treasury Department cannot legislate such a provision into the law under the guise of a regulation.

An equal division of community property between husband and wife under California law can not be construed to be a gift. A gift is defined as being "the act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another without consideration." 38 C. J. Secundum 781, and authorities there cited. It can not be said here that petitioner was "the owner" of the moiety of his salary delivered to his wife for under the law of California she was its owner, neither can it be said that he "transferred the title" to same since title thereto was already vested in her.

Gillis v. Welch, (C.C.A., 9th Cir.) 80 Fed. (2d) 165 covered transaction in California occurring prior to 1927 wherein the husband was held liable for a gift tax for transferring to his wife certain community property, since under the law then existing there the husband was the owner of all of the community property and the wife had a "mere expectancy" therein and hence the transfer of any of the community property to her constituted a gift. The Court, in passing upon the issue, said:

The interest of the wife in the property which was the subject of the gift must be determined, for it is clear that the husband could not give to the wife more than that which he had. * * * [Under-scoring ours.]

There the husband owned it all and a transfer of any part was a gift. Here the wife already owned the one-half in question, and the husband could not give to her that which he did not own.

We are not impressed with respondent's contention that because of the husband's management and control of the community property under California law his relinquishment of such control by delivery to his wife clothed the transaction with the attributes of a gift. If A and B are equal owners of a firm's business, the fact that A is the managing partner would not make his payments to B of B's interest therein a gift. As was said in *Bank of America v. Collector of Internal Revenue*, 33 Fed. Supp. 183:

* * * The management and control, which the

husband has under the law of California, does not defeat the character of the wife's interest as that of a half owner. California Civil Code, Secs. 172, 172a.

To the same effect, in Paul Cavanagh, 42 B.T.A. 1037, we declared:

The fact that under the California law the husband has a broad power of control does not detract from the wife's interest. This power is conferred upon him merely as the agent of the community and does not make him the owner of all the community property and income, nor negative the wife's present interest there as equal coowner.

In James A. Hogle, 7 T.C. 986, affirmed (C.C.A., 10th Cir.) 165 Fed. (2d) 352, [the Gov't has indicated that it will not apply for certiorari] we held that the taxpayer was not subject to a gift tax on the net gains and profits from marginal trading in securities realized by two trusts created by him, even though the trading account was operated under the taxpayer's direction, for the reason that the legal title to the amounts in question never vested in him but in the trust from the moment they arose. We said "that legal title to the amounts in question was never in the petitioner and was never transferred by him to the trusts." Such is true here. Petitioner here transferred possession, but not title. The title to the amounts in question was always vested in petitioner's wife from the very moment they were earned, not by the grace of petitioner, but by virtue of the law of California.

Respondent's imposition of a gift tax herein is reversed.

Reviewed by the Court.

Decision will be entered for the petitioner.

Opper, J., concurs only in the result.

[T.C.U.S. Seal]

Served March 29, 1949.

The Tax Court of the United States, Washington

Docket No. 12316

EDWARD M. MILLS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court as set forth in its Findings of Fact and Opinion, promulgated March 28, 1949, it is

Ordered and Decided: That there are no deficiencies in gift tax for the years 1943 and 1944.

Enter: Mar. 28, 1949.

Served Mar. 29, 1949.

[Seal] /s/ LUTHER A. JOHNSON,

Judge.

The Tax Court of the United States, Washington

Docket No. 13032

EDWARD M. MILLS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court as set forth in its Findings of Fact and Opinion, promulgated March 28, 1949, it is

Ordered and Decided: That there is no deficiency in gift tax for the year 1945.

Enter: Mar. 28, 1949.

Served Mar. 29, 1949.

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket Nos. 12316, 13032

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

EDWARD M. MILLS,

Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decisions entered by The Tax Court of the United States on March 28, 1949 that there are no deficiencies in gift tax for the years 1943, 1944 and 1945 in respect of the gift tax liability of Edward M. Mills, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Edward M. Mills, is a resident of San Francisco, California, and filed his gift tax returns for the years 1943, 1944 and 1945 with the Collector of Internal Revenue for the First District of California, whose office is in San Francisco and within the jurisdiction of the United

States Court of Appeals for the Ninth Circuit, wherein this review is sought.

Nature of Controversy

The issue presented to and passed upon by the Tax Court and which was decided contrary to the Commissioner's determination is whether the payment by the taxpayer to his wife, as her separate property, of one-half of his salary as received during the taxable years constituted a "division of community property between husband and wife into the separate property of each" within the meaning of Section 86.2(c) of Regulations 108, which regulations were established in construing Section 1000(d) of the Internal Revenue Code. The Tax Court held, contrary to the Commissioner's determination, that the payments so made to respondent's wife were not subject to gift tax within the purview of Section 1000(d) of the Internal Revenue Code and held, further, that Section 86.2 of Regulations 108 providing for a gift tax in respect of a division of community between husband and wife into the separate property of each is invalid. The deficiencies in tax determined by the Commissioner in the respective amounts of \$5,032.45, \$3,157.46 and \$2,807.77 as the result of his inclusion in respondent's net gifts of the value of one-half of his salary received during each of the taxable years were thus disapproved by the Tax Court and decisions of no deficiency in tax for the years involved were sub-

stituted for the deficiencies determined by the Commissioner.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel,

Bureau of Internal Revenue, Counsel for Petitioner
on Review.

Received and filed June 21, 1949. T.C.U.S.

[Title of Court of Appeals and Cause.]

T. C. Docket Nos. 12316, 13032

NOTICE OF FILING PETITION
FOR REVIEW

To: Mr. Edward M. Mills, 343 Sansome Street, San
Francisco 4, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of June, 1949, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decisions of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of June, 1949.

/s/ CHARLES OLIPHANT,

Chief Counsel,

Bureau of Internal Revenue, Counsel for Petitioner
on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 28th day of June, 1949.

/s/ EDWARD M. MILLS,

Respondent on Review.

Received and filed June 30, 1949. T.C.U.S.

[Title of Court of Appeals and Cause.]

T. C. Docket Nos. 12316, 13032

NOTICE OF FILING PETITION
FOR REVIEW

To: Harry R. Horrow, Esquire, Standard Oil
Building, 225 Bush Street, San Francisco 4,
California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 21st day of June, 1949, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decisions of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 21st day of June, 1949.

/s/ CHARLES OLIPHANT,

Chief Counsel,

Bureau of Internal Revenue, Counsel for Petitioner
on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 27th day of June, 1949.

/s/ HARRY R. HORROW,

Counsel for Respondent

on Review.

Received and filed June 30, 1949. T.C.U.S.

[Title of Court of Appeals and Cause.]

T. C. Docket Nos. 12316, 13032

STATEMENT OF POINTS

Comes Now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Theron L. Caudle, Assistant Attorney General, and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In entering its decisions that there are no deficiencies in gift taxes for the years 1943, 1944 and 1945.

2. In failing and refusing to sustain the deficiencies in tax determined by the Commissioner.

3. In holding and deciding that the payments made by the taxpayer to his wife as her separate property of 50% of the earnings of the taxpayer during the years 1943, 1944 and 1945 were not subject to gift tax within the purview of Section 1000 (d) of the Internal Revenue Code and Section 86.2 of Treasury Regulations 108.

4. In failing and refusing to hold and decide that the payments made by the taxpayer to his wife as her separate property of 50% of the earnings of the taxpayer during the years 1943, 1944 and 1945 constituted gifts from the taxpayer to his wife and as such were subject to gift tax within the purview of Section 1000(d) of the Internal Revenue Code and Section 86.2 of Treasury Regulations 108.

5. In holding and deciding that Section 86.2 of Treasury Regulations 108 is invalid as being an unwarranted expansion and enlargement of the meaning of Section 1000(d) of the Internal Revenue Code.

6. In that its opinion and decisions are not supported by but are contrary to its findings of fact.

7. In that its opinion and decisions are contrary to law and the Commissioner's regulations.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel,

Bureau of Internal Revenue, Counsel for Petitioner
on Review.

Statement of Service:

A copy of this Statement of Points was mailed to Harry R. Horrow, Esquire, 225 Bush Street, San Francisco 4, California, attorney for respondent on review, on July 7, 1949.

/s/ CHAS. E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

Received and filed July 7, 1949. T.C.U.S.

[Title of Court of Appeals and Cause.]

T. C. Docket Nos. 12316, 13032

RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

Pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure adopted by the United States Court of Appeals for the Ninth Circuit, you are hereby notified that the petitioner on review will not exclude or omit any part of the record in this proceeding.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

/s/ CHARLES OLIPHANT,
Chief Counsel,

Bureau of Internal Revenue, Counsel for Petitioner on Review.

Statement of Service:

A copy of this "Record on Review" was mailed to Harry R. Horrow, Esquire, 225 Bush Street, San Francisco 4, California, attorney for respondent on review, on July 7, 1949.

/s/ CHAS. E. LOWERY,

Special Attorney,

Bureau of Internal Revenue.

Received and filed July 7, 1949. T.C.U.S.

The Tax Court of the United States, Washington

Docket Nos. 12316 - 13032

COMMISSIONER OF INTERNAL REVENUE,

Petitioner on appeal,

vs.

EDWARD M. MILLS,

Respondent on appeal.

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents 1 to 30, inclusive, constitute and are all of the original papers and proceedings on file in my office as the original and complete records in the proceedings before The Tax Court of the United States entitled "Edward M. Mills, Petitioner v. Commissioner of Internal Revenue, Re-

spondent," Docket Nos. 12316 and 13032 and in which the respondent in the Tax Court proceedings has initiated appeals as above numbered and entitled, together with true copies of the docket entries in said Tax Court proceedings, as the same appear in the official docket books in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of July, 1949.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 12305. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Edward M. Mills, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 27, 1949.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket Nos. 12316 and 13032

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

EDWARD M. MILLS,

Respondent.

DESIGNATION OF PORTIONS OF RECORD
TO BE PRINTED

The Commissioner of Internal Revenue, petitioner in the above entitled proceedings, hereby designates the following portions of record on review on file in this Court which are to be printed:

1. (No. 1) Docket entries in Docket No. 12316.
2. (No. 1) Docket entries in Docket No. 13032.
3. (No. 2) Petition of Edward M. Mills, Petitioner, filed in the Tax Court of the United States on October 16, 1946, in Docket No. 12316.
4. (No. 4) Answer of the Commissioner of Internal Revenue filed in the Tax Court November 27, 1946, in Docket No. 12316.
5. (No. 8) Petition of Edward M. Mills filed in the Tax Court on February 11, 1947, in Docket No. 13032.
6. (No. 10) Answer of the Commissioner filed in the Tax Court March 19, 1947, in Docket No. 13032.

7. (No. 13) Joint motion for consolidation of proceedings and for placing on hearing calendar together with orders stamped thereon to the effect that the motion was granted by the Tax Court May 7, 1947.

8. (No. 15) Transcript of proceedings had before the Tax Court at San Francisco, California, on May 26, 1947, in Docket Nos. 12316 and 13032.

9. (No. 16) Stipulation of facts in Docket Nos. 12316 and 13032 filed at the hearing before the Tax Court on May 26, 1947.

10. (No. 17) Petitioner's Exhibit No. 1, being gift tax return for the calendar year 1943 of Edward M. Mills. Omit all stampings as also the affidavit of person filing return and in the place thereof state merely that return was duly verified. Also omit Schedule B from the second page and the verification of the affidavit of Edward M. Mills attached to the return and in the place thereof make a statement to the effect that it is duly verified.

11. (No. 17) Petitioner's Exhibit No. 2, gift tax return of E. M. Mills for the calendar year 1944. Omit all stamping as also the affidavit of person filing return and in the place thereof indicate that the return was duly verified. On the second page omit Schedule B.

12. (No. 17) Petitioner's Exhibit No. 3, gift tax return of E. M. Mills for the calendar year 1945. Omit all stamps and affidavit of person filing return, stating in the place thereof that the same was duly verified. On the second page omit Schedule B.

13. (No. 17) Petitioner's Exhibit No. 4, information return of Edward M. Mills of gifts for the calendar year 1943. Omit all stampings and the instructions on the second page indicating that these instructions are omitted.

14. (No. 17) Petitioner's Exhibit No. 5, information return of Edward M. Mills of gifts for the calendar year 1944. Omit stamps and instructions on second page indicating that these are omitted.

15. (No. 17) Petitioner's Exhibit No. 6, information return of E. M. Mills for the calendar year 1945. Omit stamps and instructions on the second page indicating that the instructions have been omitted.

16. (No. 25) Report of the Tax Court.

17. (No. 26) Decision of the Tax Court in Docket No. 12316 entered March 28, 1949.

18. (No. 27) Decision of the Tax Court in Docket No. 13032 entered March 28, 1949.

19. (No. 28) Petition for review filed in the United States Court of Appeals for the Ninth Circuit by the Commissioner of Internal Revenue in Tax Court Dockets 12316 and 13032 together with the filing date (July 27, 1929), and append thereto a statement to the effect that due notice of the filing of the petition (No. 28) was given to Harry R. Horrow, Esq., Standard Oil Building, 225 Bush Street, San Francisco 4, California, counsel for respondent on review by Charles Oliphant, Chief Counsel of the Bureau of Internal Revenue, counsel for petitioner on review on June 21, 1949, personal

service of such notice being accepted by Harry R. Horrow, Esq., counsel for respondent on review on June 27, 1949.

20. (No. 29) Statement of points.

21. (No. 30) Notice re contents of record on review.

22. Certificate of the Clerk of the Tax Court. August 2, 1949.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

Docketed

[Endorsed]: Filed Aug. 8, 1949. U.S.C.A.

